WILLKIE FARR & GALLAGHER

May 9, 1997

**Ex Parte**

William F. Caton, Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, DC 20554



Re: Ex Parte Meeting
CC Docket No. 96-254

Dear Mr. Caton:

This is to advise you that earlier today, representatives of the Telecommunications Industry Association (TIA) met with the staff of the Common Carrier Bureau to discuss TIA's position with respect to various issues addressed in its Comments and Reply Comments in the above-captioned proceeding. FCC staff members participating in the meeting included Leslie Selzer, Matthew Nagler, William Howden, and Gregory Cooke. Representatives of TIA in attendance included TIA's Director of Government Relations, Grant Seiffert, members of TIA's Section 273 Working Group, and the undersigned. The attached document describes the substance of TIA's presentation.

Respectfully submitted,

John L. McGrew

cc: Leslie J. Selzer
Matthew G. Nagler
William E. Howden
Gregory M. Cooke
Secretary (two copies)



Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384
202 328 8000

Telex: RCA 229800
WU 89-2762
Fax: 202 887 8979

5/9/97

# TIA EX PARTE PRESENTATION
# SECTION 273 RULEMAKING
# (CC DOCKET 96-254)

## I. OVERVIEW OF COMPETITIVE CONCERNS [TIA Comments pp. 1-6; Reply Comments pp. 1-3; Staff Question No. 2]

**A. Positive Impact of MFJ on Telecom Equipment Manufacturing Industry** -- increased competition, lower prices, new/improved products, more dynamic, globally competitive domestic equipment industry.

**B. TIA's goal** is to assist the FCC in implementing Section 273 and related provisions in a way which preserves these benefits, and prevents the return of practices that served to limit competition in equipment markets pre-divestiture.

**C. *Specific Competitive Concerns***

1. RBOCs continue to maintain a dominant position in local exchange markets and control of essential network facilities within their regions.

2. Removal of manufacturing constraints gives RBOCs renewed incentives to engage in practices which operate to impede competition in telecom equipment and CPE markets.

   a. Cross-subsidization

      1) improper pricing of transfers between BOCs and manufacturers in which they have a financial interest.

      2) misallocation of costs associated with manufacturing activities.

   b. Discrimination

      1) disclosure of network-related information.

      2) network design/standards.

      3) procurement.

**D. Need for strong safeguards**

1. While the 1996 Telecom Act ties an RBOC's entry into manufacturing to its compliance with the market-opening requirements established as a precondition to in-region interLATA entry in Section 271(d), compliance with these requirements merely establishes a basic foundation for competition in local markets.

   [Note: In response to the staff's Question No. 2, to the extent Sections 271 and 273 condition RBOC entry into in-region interLATA services and manufacturing on compliance with the competitive "checklist," these provisions provide additional incentives to comply with the market-opening requirements established in Sections 251 and 252 of the Act.]

2. Pursuant to Section 273(a), an RBOC is authorized to engage in manufacturing on a region-wide basis, through one or more separate affiliates, once any of its affiliated BOCs receive "in-region" interLATA authority under Section 271 in any state in which they operate.

3. Even in those areas where its affiliated BOCs have satisfied the market-opening requirements of Section 271(d), an RBOC will retain a dominant position. Accordingly, significant risks to competition will remain for some time after the RBOCs are granted authority to manufacture under Section 273(a).

4. Recent developments indicate that the deployment of alternative facilities-based networks is at best likely to occur more slowly than was anticipated at the time the 1996 Act was enacted.

5. Consolidation of leading equipment purchasers (e.g., Southwestern Bell/PacTel, Bell Atlantic/NYNEX) further increases risks to competition in equipment markets and the need for strong safeguards.

6. Accordingly, it is essential that the FCC adopt rules implementing Section 273 and related provisions which address the full range of risks to competition in manufacturing in an effective, comprehensive manner. Where necessary, TIA urges the Commission to utilize the supplemental authority granted under Section 273(g) to ensure that its rules adequately address all potential forms of cross-subsidy and discrimination.

## II. SECTION 273(a) AUTHORIZATION PROVISIONS [TIA Comments pp. 6-12; Reply pp. 4-9]

**A. Timing of RBOC Entry [TIA Reply pp. 4-5; Staff Question No. 12]** -- The argument advanced by some RBOCs that BOC "affiliates" are already free to

manufacture is wholly at odds with the statutory scheme and should be rejected. A review of the legislative history makes it clear that the RBOCs are to be permitted to engage in manufacturing only after their receipt of an in-region interLATA authorization and then only through a separate affiliate. Adoption of the RBOCs' proposed construction would render Section 273(a) nonsensical and, as a practical matter, meaningless.

**B. Joint Manufacturing Prohibition [TIA Comments p. 7; Reply p. 6; Staff Question No. 3]**

1. The NPRM identifies some but not all of the relationships prohibited under Section 273(a). By its terms, this provision also bars joint manufacturing between or among affiliates of unaffiliated BOCs, as well as joint manufacturing involving an affiliate of one BOC and otherwise unaffiliated BOCs or RBOCs.

2. TIA believes the Section 273(a) joint manufacturing restriction does not bar a BOC from engaging in "close collaboration" with any manufacturer, including BOC affiliates, so long as the latter term is properly construed to preclude direct BOC involvement in activities which constitute "manufacturing," as defined under the MFJ.

**C. Definition of Manufacturing [TIA Comments pp. 7-12; Reply pp. 7-9; Staff Question 4(a)-(c)]**

1. TIA agrees that the term "manufacture" should be construed in a manner consistent with the definition of "manufacturing" adopted under the MFJ. Section 273(h) provides that the term "manufacturing" has "the same meaning as such term has under the AT&T Consent Decree [i.e., the MFJ]." This term was not defined in the decree itself, but was construed by the District Court and the Court of Appeals to include not only fabrication, but also the design and development of hardware and software that is "integral to" telecommunications equipment and CPE. The definition adopted in Section 273(h) would be meaningless if it were not construed to include the MFJ case law, which is explicitly incorporated in the definition of "AT&T Consent Decree" adopted in Section 601 of the 1996 Act.

2. An RBOC may engage in software development which falls within the scope of "manufacturing," as defined under the MFJ, only after receiving authorization pursuant to Section 273(a) and only through a separate affiliate, consistent with the requirements of Section 273(a). The RBOCs and their affiliated BOCs already are permitted to engage in software development that does not fall within the scope of the MFJ definition of "manufacturing," i.e., the development (or modification) of software that is not "integral to" telecommunications equipment or CPE.

3. In light of the increasing competitive significance of software, TIA urges the Commission to clarify which types of software activities constitute "manufacturing" and must be conducted through the BOC's separate affiliate. However, the Commission clearly cannot and should not adopt a definition of "manufacturing" that is fundamentally different from the MFJ definition (e.g., one that excludes product design and development entirely), as some RBOCs have suggested.

## III. CLOSE COLLABORATION, RESEARCH, AND ROYALTY AGREEMENTS [TIA Comments pp. 12-18; Reply pp. 9-13]

### A. Close Collaboration [Staff Question Nos. 5(a)-(c)]

1. Section 273(b)(1) allows a BOC to interact with a manufacturer to the extent necessary to ensure effective interconnection and interoperation of products designed by the manufacturer for use in connection to the network. A BOC may engage in such interaction before or after it obtains in-region interLATA authority.

   Significantly, this section of the statute does not state that a BOC may participate directly "in" the design of such equipment. It merely clarifies the BOCs' authority to communicate with manufacturers "during" the period in which they (the manufacturers) are engaged in such activities.

   [Note: In response to the staff's Question No. 5(a), TIA does not oppose "nonmanufacturing collaboration." Nor would TIA limit such collaboration to the development of generic specifications.]

2. Adoption of a broad construction of Section 273(b)(1) which allows the BOCs themselves to engage in product-specific design activities would effectively repeal the authorization and joint manufacturing provisions of Section 273(a), as well as the "separate affiliate" requirement of Section 272(a). Product design is the heart of the manufacturing process, and for this reason, RBOCs were barred under the MFJ from engaging in the design of telecommunications equipment and CPE. Language contained in the Senate bill which would have authorized the BOCs to engage in "design" activities was deleted from the legislation in conference. Moreover, Section 272(a) explicitly provides that all BOC "manufacturing" activities, without exception, must be undertaken through a separate affiliate. Accordingly, the term "close collaboration" should be narrowly construed to allow BOCs to work with manufacturers in cooperative activities which do not constitute manufacturing, to the extent necessary to ensure effective interconnection and interoperation of products designed for use in or connection to the BOC's network.

3. While a BOC is not required to conduct activities authorized pursuant to Section 273(b)(1) through a separate affiliate (because such activities do not include "manufacturing"), a BOC engaged in such activities must interact with its manufacturing affiliate(s) in a manner consistent with the structural separation requirements and related non-discrimination provisions of Section 272. Moreover, all activities undertaken pursuant to Section 273(b) must be conducted in accordance with the requirements of Section 273(c) and (e), whether or not the BOC has obtained manufacturing authority pursuant to Section 273(a).

## B. BOC Research/Royalty Agreements [Staff Question No. 6]

1. To preserve the integrity of the statutory scheme, the provisions of Section 273(b)(2) also must be narrowly construed to exclude activities which fall within the scope of "manufacturing" as defined under the MFJ. By its terms, this provision permits a BOC to engage in research that is (or may be) "related to" manufacturing, but does not authorize the BOCs themselves to engage in "manufacturing." An interpretation that allows a BOC itself to engage in product-specific research that constitutes "manufacturing" would be inconsistent with the unqualified separate affiliate requirement established in Section 272(a). The fact that the Senate language authorizing BOC "research and design" was revised in conference to delete the reference to "design" activities is also strong evidence that this provision does not encompass such activities.

2. Rather, Section 273(b)(2) makes clear a BOC's ability to engage in "generic" basic and applied research and to license the intellectual property resulting from such activities to manufacturers, in return for compensation in the form of royalty payments. However, pursuant to Section 272(c)(1), where a BOC licenses intellectual property or other technical information to its manufacturing affiliate, such arrangements must be made available to other manufacturers on a non-discriminatory basis. To the extent that a BOC is permitted to engage in joint research with its manufacturing affiliate, the Commission should make it clear that any intellectual property arising from such activities also must be made available to all manufacturers on reasonable, non-discriminatory terms and conditions. Similarly, in order to reduce the potential for discrimination in procurement, the Commission should adopt rules which preclude licensing arrangements that provide for the receipt of royalties that are tied to the BOC's own purchases of equipment from licensed manufacturers. If necessary, the Commission should invoke its supplemental authority under Section 273(g) as a basis for such rules.

## IV. INFORMATION DISCLOSURE REQUIREMENTS [TIA Comments pp. 18-26; Reply pp. 14-19; Staff Question Nos. 7-11]

### A. Nature and Scope of BOC Disclosure Obligations

1. As the Commission has acknowledged, the FCC's Computer Rules and other existing information disclosure requirements were not designed to, and do not address "the specific needs of manufacturers who wish to develop new network products." [NPRM, Paragraph 18] While information released pursuant to the Part 51 or Part 64 disclosure rules may be useful to manufacturers, the Commission cannot assume that compliance with these rules is sufficient to satisfy the requirements of Section 273(c), which are designed to ensure that all manufacturers receive timely and non-discriminatory access to information that affects their ability to design network equipment and CPE that interconnects and interoperates effectively with BOC network facilities.

2. As the Commission also recognizes, the provisions of Section 273(c) apply "on their face" to all BOCs. [NPRM ¶ 17] Accordingly, the Commission should reject the RBOCs' attempt to exempt BOCs that are not engaged in manufacturing from the information disclosure requirements of Section 273(c). The RBOCs' proposed construction conflicts with the express terms and underlying purposes of the statute. Limiting application of these requirements to those BOCs that are engaged in manufacturing pursuant to Section 273(a) might lead the BOCs to withhold or delay public disclosure of information that affects the design of equipment and encourage discrimination in favor of non-"affiliate" manufacturers in which a BOC has a financial interest.

3. TIA agrees with the Commission's tentative conclusion that Section 273(c)(2) bars the BOCs from disclosing information which is required to be disclosed under Section 273(c)(1) unless it is publicly available, i.e., filed with the Commission. Moreover, Section 272(c)(1) imposes an independent non-discrimination obligation on a BOC that discloses network-related information to its manufacturing affiliate(s). To eliminate uncertainty and reduce the risks to competition arising from discriminatory disclosures of network-related information, the Commission should adopt rules which require a BOC that discloses any such information to one manufacturer to make the same information available to all manufacturers on equal terms and conditions. The Commission should invoke its supplemental authority under Section 273(c)(3) and, if necessary, Section 273(g) to establish such rules.

**B. Timing of Disclosure** - Assuming that the potential for BOC discrimination is contained in this manner, TIA believes that it may be appropriate to utilize the

"make-buy" point, at least initially, as a basis for determining timing of disclosures required pursuant to Section 273(c)(1). TIA's proposed rules generally require disclosure of network changes at the make/buy point, but at least 12 months prior to implementation; where changes can be implemented on less than 12 months notice, disclosure would be required at the make/buy point, but at least 6 months before implementation. TIA also supports an appropriately-crafted exemption for bona fide equipment trials.

C. **Method of Disclosure** - Section 273(c)(1) requires each BOC to "maintain and file" information concerning its network protocols and technical requirements and changes thereto "with the Commission." TIA's proposed rules would require the BOCs to submit an "official" paper copy and diskette copies to the Commission, in a format similar to that established for notices under Section 251(c)(5), in order to ensure the reliability and security of the information contained in the notice.

[Note: In response to Question Nos. 9-11, Section 273(c) imposes independent disclosure obligations on "each" BOC, and would appear by its terms to require the submission of "baseline" information concerning the BOC's network that falls within the scope of this provision. TIA is unable to estimate the total volume of material required to provide "full and complete" baseline information, but is willing to explore ways of reducing the burden on the affected carriers and the Commission, where such concerns can be accommodated in a manner consistent with the underlying purposes of the statute.]

D. **Content of Disclosure** - TIA's proposed rules implementing Section 273(c)(1) would require, at a minimum, that each BOC disclose information concerning all protocols and technical requirements for connection with and use of any of the BOC's designated points of interconnection and all BOC network elements, including information relating to 1) connections between BOC network elements, and 2) connections between customer premises equipment and BOC network elements.

E. **Treatment of Proprietary Information** - While the fact that information subject to disclosure may be considered confidential or proprietary cannot be used to "shield" a BOC from compliance with the requirements of the statute, TIA supports adoption of rules providing for the disclosure of any proprietary or confidential information which falls within the scope of Section 273(c) pursuant to an appropriate non-disclosure and/or licensing agreement.

## V. BELLCORE; STANDARDS/CERTIFICATION PROVISIONS [TIA Comments pp. 26-45; Reply pp. 20-26]

### A. Bellcore Manufacturing [Staff Question No. 13]

1. TIA takes exception to the FCC's tentative conclusion that the announced sale of Bellcore to SAIC will operate to free Bellcore from the manufacturing restriction imposed under Section 273(d)(1). TIA urges the Commission to defer making a determination on this issue until full and complete information is available with regard to the proposed sale and future relationship(s) between and among the BOCs, Bellcore, SAIC, and the new National Telecommunications Alliance (NTA).

2. In order to determine definitively whether Bellcore will be permitted to manufacture following its proposed sale to SAIC, it is not sufficient to look only at whether the RBOCs have retained "ownership" interests in Bellcore. Consistent with the provisions of Section 273(d)(1), the Commission also must gather sufficient information to make an informed judgment as to whether the RBOCs individually or collectively, will retain de jure or de facto "control" over Bellcore.

   [Note: In response to the staff's Question No. 13, TIA construes Section 273(d)(8)(A) as superseding the general definition of "affiliate" contained in Section 3 of the Act only to the extent that it imposes a lower threshold for ownership for purposes of Section 273(d)(1)(B). The language employed in Section 273(d)(8) does not address any other aspect of the Section 3 definition, and therefore an analysis of the "control" issue remains relevant to a determination as to whether the Section 273(d)(1)(B) restriction remains applicable.]

3. TIA agrees with the Commission's tentative conclusion that to the extent Bellcore is permitted to engage in manufacturing, it must do so in a manner consistent with the "separate affiliate" requirements and other safeguards established in Section 273(d). However, TIA disagrees with Bellcore's assertion that Section 273(d)(3) allows it to choose whether to place manufacturing or certification activities in a separate affiliate, and believes that this section clearly contemplates that it is the certifying entity's manufacturing activities that must be conducted through a separate affiliate. TIA also opposes Bellcore's suggestion that it should be allowed to utilize "experts" that are employed in its standards and certification activities in connection with its manufacturing activities as well, notwithstanding the statutory requirement that such activities must have "segregated facilities and separate employees." (See Bellcore Reply - pp. 14-15)

## B. Standards/Certification

1. TIA urges the FCC to adopt the definition of the term "standards" proposed by TIA, which is based on the definition proposed by OMB in its revised Circular No. A-119, with certain modifications designed to reflect the specific requirements and underlying purposes of Section 273(d).

2. TIA believes that Section 273(d) was not intended to address the development of standards by accredited SDO's or the interoperability testing and related activities of individual manufacturers, and urges the Commission to define the term "standards" and clarify the term "certification," in order to ensure that Section 273(d) is not inappropriately applied to such entities.

3. Consistent with the requirements of Section 273(d)(4), the FCC should make it clear that Bellcore and other non-accredited SDOs that are engaged in the development of "industry-wide" standards or generic requirements must adopt funding arrangements that are reasonable, non-discriminatory, and non-exclusionary. In this regard, TIA urges the use of a "sliding-scale" approach to funding, a "one vote per company" rule, and a requirement that prospective participants be given the opportunity to enter/exit and fund projects at various stages.

4. In applying the provisions of Section 273(d)(4), the Commission should take care to ensure that to the extent that RBOC joint purchasing activities encompass the development of "industry-wide" standards or generic requirements, they are conducted in a manner consistent with the requirements of this section.

5. Parties seeking to have the requirements of Sections 273(d)(3) or (d)(4) removed pursuant to Section 273(d)(6) properly bear the burden of demonstrating that such action is appropriate, and should be required to provide appropriate documentation demonstrating that there are other sources providing commercially viable alternatives to the applicant's standards, generic requirements, or certification services, which are in fact used within the industry. Bellcore's proposed construction of this provision clearly conflicts with the express requirements of the statute, and must be rejected.

# VI. BOC PROCUREMENT [TIA Comments pp. 46-53; Reply pp. 26-29]

**A. Scope of Application [Staff Question Nos. 14-15]** - TIA believes that the procurement requirements of Section 273(e) apply to <u>all</u> BOCs, not merely those authorized to engage in manufacturing, through a separate affiliate, pursuant to Section 273(a). Construing the provisions of Section 273(e) as applicable only to

BOCs that are actually engaged in manufacturing would be contrary to the language and underlying purposes of this section, which includes provisions barring BOC discrimination in favor of "affiliates" or "related persons" and requires "each" BOC, without exception, to purchase solely on the basis of "price, quality, delivery, and other commercial factors."

While the Commission need not look beyond the literal terms of this section of the statute, application of the Section 273(e) requirements to all BOCs is consistent with the overall purposes of Section 273, which is designed to ensure that all manufacturers continue to have the opportunity to compete on the merits of their respective products. It is unlikely that a BOC and its parent RBOC will not have a material financial interest of some sort in particular manufacturers, irrespective of whether the RBOC itself has been authorized to manufacture pursuant to Section 273(a). The existence of any such interests creates incentives for discrimination in BOC procurement, even where the BOC has no "affiliate" that manufactures.

**B. Non-Discrimination Requirements [Staff Question No. 17]**

1. In implementing Section 273(e)(1)(A), a BOC must do more than merely announce that its procurement process is open to "unrelated persons." The requirements of Section 273(e)(1)(B) and (e)(2) explicitly require the BOCs to affirmatively avoid discrimination and make procurement decisions based on an "objective assessment" of the relative merits of products produced by "related" and "unrelated" persons.

2. The language of Section 273(e)(1)(B) unequivocally bars any form of discrimination in favor of equipment produced or supplied by a BOC "affiliate" or "related person." For purposes of this section, the latter term should be defined to include all BOC "affiliates," as well as any supplier in which a BOC or its parent RBOC has a material financial interest that gives it a direct and continuing share of the supplier's business or revenues.

3. Consistent with the approach adopted in its Non-Accounting Safeguards Order, in implementing Section 273(e)(2), the Commission should resist RBOC efforts to narrow the scope of the statutory terms "equipment," "services," and "software." In addition, the Commission should clarify that the inclusion of the phrase "other commercial factors" does not provide a basis for preferential treatment of BOC "affiliates" (or "related persons") or other anticompetitive procurement practices.

   [Note: In response to the staff's Question No. 17, TIA does not believe that the phrase "other commercial factors" requires further clarification at this time.]

## C. Enforcement [Staff Question Nos. 1, 16, 18]

1. TIA strongly agrees with the Commission's observation that traditional, complaint-based mechanisms are likely to be inadequate in ensuring compliance with the procurement requirements and other safeguards contained in 273 and related provisions.

2. Accordingly, TIA urges the Commission to establish additional enforcement mechanisms. In particular, TIA believes that each BOC should be required to prepare and submit for approval plans describing the standards and procedures which the BOC will employ to ensure compliance with the requirements of Section 273(e) (including those relating to the protection of vendor proprietary information) and the other non-structural safeguards established in Sections 272 and 273 of the Act.

   A requirement of this nature would allow the BOCs flexibility and should not be unduly burdensome, since they were subject to a similar requirement, pursuant to Section II.C. of the MFJ, for more than a decade prior to enactment of the 1996 Act. Implementation of such a requirement would ensure at least some degree of transparency in the BOCs' procurement process, and would provide a more effective basis for ensuring compliance than an approach which relies solely on case-by-case, complaint-based determinations.

3. In addition, TIA urges the Commission to adopt appropriate reporting and record retention requirements, in order to ensure the availability of information necessary for effective monitoring and enforcement.

4. The Commission should also utilize the biennial audits required under Section 272(d), as well as spot examinations of BOC procurement records, to ensure compliance.